117th Congress, 2d Session – – – – – – – – – – – – House Document 117–110

# AMENDMENT AND AN ADDITION TO THE FEDERAL RULES OF CIVIL PROCEDURE

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## COMMUNICATION

FROM

## THE CHIEF JUSTICE, THE SUPREME COURT OF THE UNITED STATES

TRANSMITTING

AN AMENDMENT AND AN ADDITION TO THE FEDERAL RULES OF CIVIL PROCEDURE THAT HAVE BEEN ADOPTED BY THE SUPREME COURT, PURSUANT TO SEC. 104(f); (108 STAT. 4110)

APRIL 14, 2022.—Referred to the Committee on the Judiciary and ordered to be printed

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U.S. GOVERNMENT PUBLISHING OFFICE
29–011 WASHINGTON : 2022

SUPREME COURT OF THE UNITED STATES,
*Washington, DC, April 11, 2022.*

Hon. NANCY PELOSI,
*Speaker of the House of Representatives,*
*Washington, DC.*

DEAR MADAM SPEAKER: I have the honor to submit to the Congress an amendment and an addition to the Federal Rules of Civil Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying the amended and additional rules are the following materials that were submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code: a transmittal letter to the Court dated October 18, 2021; a redline version of the rules with committee notes; an excerpt from the March and September 2021 reports of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States; and excerpts from the December 2020 and May 2021 reports of the Advisory Committee on Civil Rules.

Sincerely,

JOHN G. ROBERTS, Jr.
*Chief Justice.*

April 11, 2022

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. The Federal Rules of Civil Procedure are amended to include Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g) and an amendment to Rule 7.1.

[*See infra* pp. ___ ___ ___.]

2. The foregoing amendment and addition to the Federal Rules of Civil Procedure shall take effect on December 1, 2022, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. THE CHIEF JUSTICE is authorized to transmit to the Congress the foregoing amendment and addition to the Federal Rules of Civil Procedure in accordance with the provisions of Section 2074 of Title 28, United States Code.

## PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

**Rule 7.1. Disclosure Statement**

**(a) Who Must File; Contents.**

**(1)** ***Nongovernmental Corporations.*** A nongovernmental corporate party or a nongovernmental corporation that seeks to intervene must file a statement that:

**(A)** identifies any parent corporation and any publicly held corporation owning 10% or more of its stock; or

**(B)** states that there is no such corporation.

**(2)** ***Parties or Intervenors in a Diversity Case.*** In an action in which jurisdiction is based on diversity under 28 U.S.C. § 1332(a), a party or intervenor must, unless the court orders otherwise, file a disclosure statement. The

statement must name—and identify the citizenship of—every individual or entity whose citizenship is attributed to that party or intervenor:

**(A)** when the action is filed in or removed to federal court, and

**(B)** when any later event occurs that could affect the court's jurisdiction under § 1332(a).

**(b) Time to File; Supplemental Filing.** A party, intervenor, or proposed intervenor must:

**(1)** file the disclosure statement with its first appearance, pleading, petition, motion, response, or other request addressed to the court; and

* * * * *

## SUPPLEMENTAL RULES FOR SOCIAL SECURITY ACTIONS UNDER 42 U.S.C. § 405(g)

### Rule 1. Review of Social Security Decisions Under 42 U.S.C. § 405(g)

(a) **Applicability of These Rules.** These rules govern an action under 42 U.S.C. § 405(g) for review on the record of a final decision of the Commissioner of Social Security that presents only an individual claim.

(b) **Federal Rules of Civil Procedure.** The Federal Rules of Civil Procedure also apply to a proceeding under these rules, except to the extent that they are inconsistent with these rules.

**Rule 2. Complaint**

**(a) Commencing Action.** An action for review under these rules is commenced by filing a complaint with the court.

**(b) Contents.**

**(1)** The complaint must:

**(A)** state that the action is brought under § 405(g);

**(B)** identify the final decision to be reviewed, including any identifying designation provided by the Commissioner with the final decision;

**(C)** state the name and the county of residence of the person for whom benefits are claimed;

**(D)** name the person on whose wage record benefits are claimed; and

**(E)** state the type of benefits claimed.

**(2)** The complaint may include a short and plain statement of the grounds for relief.

**Rule 3. Service**

The court must notify the Commissioner of the commencement of the action by transmitting a Notice of Electronic Filing to the appropriate office within the Social Security Administration's Office of General Counsel and to the United States Attorney for the district where the action is filed. If the complaint was not filed electronically, the court must notify the plaintiff of the transmission. The plaintiff need not serve a summons and complaint under Civil Rule 4.

**Rule 4. Answer; Motions; Time**

**(a)** **Serving the Answer.** An answer must be served on the plaintiff within 60 days after notice of the action is given under Rule 3.

**(b)** **The Answer.** An answer may be limited to a certified copy of the administrative record, and to any affirmative defenses under Civil Rule 8(c). Civil Rule 8(b) does not apply.

**(c)** **Motions Under Civil Rule 12.** A motion under Civil Rule 12 must be made within 60 days after notice of the action is given under Rule 3.

**(d)** **Time to Answer After a Motion Under Rule 4(c).** Unless the court sets a different time, serving a motion under Rule 4(c) alters the time to answer as provided by Civil Rule 12(a)(4).

**Rule 5. Presenting the Action for Decision**

The action is presented for decision by the parties' briefs. A brief must support assertions of fact by citations to particular parts of the record.

**Rule 6. Plaintiff's Brief**

The plaintiff must file and serve on the Commissioner a brief for the requested relief within 30 days after the answer is filed or 30 days after entry of an order disposing of the last remaining motion filed under Rule 4(c), whichever is later.

**Rule 7. Commissioner's Brief**

The Commissioner must file a brief and serve it on the plaintiff within 30 days after service of the plaintiff's brief.

**Rule 8. Reply Brief**

The plaintiff may file a reply brief and serve it on the Commissioner within 14 days after service of the Commissioner's brief.

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
*Presiding*

HONORABLE ROSLYNN R. MAUSKOPF
*Secretary*

October 18, 2021

MEMORANDUM

To: Chief Justice of the United States
Associate Justices of the Supreme Court

From: Judge Roslynn R. Mauskopf Roslyn R. Mauskopf

RE: TRANSMITTAL OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I transmit for the Court's consideration a proposed amendment to Civil Rule 7.1 and new Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g), which have been approved by the Judicial Conference. The Judicial Conference recommends that the amended rule and new rules be adopted by the Court and transmitted to Congress pursuant to law.

For your assistance in considering the proposed amendments, I am transmitting (i) clean and blackline copies of the amended rule and new rules along with committee notes; (ii) excerpts from the March and September 2021 reports of the Committee on Rules of Practice and Procedure to the Judicial Conference; and (iii) excerpts from the December 2020 and May 2021 reports of the Advisory Committee on Civil Rules.

Attachments

## PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE[1]

**Rule 7.1. Disclosure Statement**

**(a) Who Must File; Contents.**

(1) ***Nongovernmental Corporations.*** A nongovernmental corporate party or a nongovernmental corporation that seeks to intervene must file ~~2 copies of~~ a ~~disclosure~~ statement that:

~~(1)~~(A) identifies any parent corporation and any publicly held corporation owning 10% or more of its stock; or

~~(2)~~(B) states that there is no such corporation.

(2) ***Parties or Intervenors in a Diversity Case.*** In an action in which jurisdiction is based on diversity under 28 U.S.C. § 1332(a), a party

[1] New material is underlined; matter to be omitted is lined through.

or intervenor must, unless the court orders otherwise, file a disclosure statement. The statement must name—and identify the citizenship of—every individual or entity whose citizenship is attributed to that party or intervenor:

**(A)** when the action is filed in or removed to federal court, and

**(B)** when any later event occurs that could affect the court's jurisdiction under § 1332(a).

**(b) Time to File; Supplemental Filing.** A party, intervenor, or proposed intervenor must:

**(1)** file the disclosure statement with its first appearance, pleading, petition, motion, response, or other request addressed to the court; and

* * * * *

**Committee Note**

Rule 7.1(a)(1). Rule 7.1 is amended to require a disclosure statement by a nongovernmental corporation that seeks to intervene. This amendment conforms Rule 7.1 to similar recent amendments to Appellate Rule 26.1 and Bankruptcy Rule 8012(a).

Rule 7.1(a)(2). Rule 7.1 is further amended to require a party or intervenor in an action in which jurisdiction is based on diversity under 28 U.S.C. § 1332(a) to name and disclose the citizenship of every individual or entity whose citizenship is attributed to that party or intervenor. The disclosure does not relieve a party that asserts diversity jurisdiction from the Rule 8(a)(1) obligation to plead the grounds for jurisdiction, but is designed to facilitate an early and accurate determination of jurisdiction.

Two examples of attributed citizenship are provided by § 1332(c)(1) and (2), addressing direct actions against liability insurers and actions that include as parties a legal representative of the estate of a decedent, an infant, or an incompetent. Identifying citizenship in such actions is not likely to be difficult, and ordinarily should be pleaded in the complaint. But many examples of attributed citizenship arise from noncorporate entities that sue or are sued as an entity. A familiar example is a limited liability company, which takes on the citizenship of each of its owners. A party suing an LLC may not have all the information it needs to plead the LLC's citizenship. The same difficulty may arise with respect to other forms of noncorporate entities, some of them familiar—such as partnerships and limited partnerships—and some of them more exotic, such as "joint ventures." Pleading on information and belief is acceptable at the pleading stage, but disclosure is necessary both to ensure that diversity jurisdiction exists and to protect against the waste

that may occur upon belated discovery of a diversity-destroying citizenship. Disclosure is required by a plaintiff as well as all other parties and intervenors.

What counts as an "entity" for purposes of Rule 7.1 is shaped by the need to determine whether the court has diversity jurisdiction under § 1332(a). It does not matter whether a collection of individuals is recognized as an entity for any other purpose, such as the capacity to sue or be sued in a common name, or is treated as no more than a collection of individuals for all other purposes. Every citizenship that is attributable to a party or intervenor must be disclosed.

Discovery should not often be necessary after disclosures are made. But discovery may be appropriate to test jurisdictional facts by inquiring into such matters as the completeness of a disclosure's list of persons or the accuracy of their described citizenships. This rule does not address the questions that may arise when a disclosure statement or discovery responses indicate that the party or intervenor cannot ascertain the citizenship of every individual or entity whose citizenship may be attributed to it.

The rule recognizes that the court may limit the disclosure in appropriate circumstances. Disclosure might be cut short when a party reveals a citizenship that defeats diversity jurisdiction. Or the names of identified persons might be protected against disclosure to other parties when there are substantial interests in privacy and when there is no apparent need to support discovery by other parties to go behind the disclosure.

Disclosure is limited to individuals and entities whose citizenship is attributed to a party or intervenor. The rules that govern attribution, and the time that controls the determination of complete diversity, are matters of subject-

matter jurisdiction that this rule does not address. A supplemental statement is required if an event occurs after initial filing in federal court or removal to it that requires a determination of citizenships as they exist at a time after the initial filing or removal.

Rule 7.1(b). Rule 7.1(b) is amended to reflect the provisions in Rule 7.1(a) that extend the disclosure obligation to proposed intervenors and intervenors.

## SUPPLEMENTAL RULES FOR SOCIAL SECURITY ACTIONS UNDER 42 U.S.C. § 405(g)

**Rule 1. Review of Social Security Decisions Under 42 U.S.C. § 405(g)**

**(a) Applicability of These Rules.** These rules govern an action under 42 U.S.C. § 405(g) for review on the record of a final decision of the Commissioner of Social Security that presents only an individual claim.

**(b) Federal Rules of Civil Procedure.** The Federal Rules of Civil Procedure also apply to a proceeding under these rules, except to the extent that they are inconsistent with these rules.

**Rule 2. Complaint**

**(a) Commencing Action.** An action for review under these rules is commenced by filing a complaint with the court.

**(b) Contents.**

(1) The complaint must:

(A) state that the action is brought under § 405(g);

(B) identify the final decision to be reviewed, including any identifying designation provided by the Commissioner with the final decision;

(C) state the name and the county of residence of the person for whom benefits are claimed;

(D) name the person on whose wage record benefits are claimed; and

**(E)** state the type of benefits claimed.

**(2)** The complaint may include a short and plain statement of the grounds for relief.

**Rule 3. Service**

The court must notify the Commissioner of the commencement of the action by transmitting a Notice of Electronic Filing to the appropriate office within the Social Security Administration's Office of General Counsel and to the United States Attorney for the district where the action is filed. If the complaint was not filed electronically, the court must notify the plaintiff of the transmission. The plaintiff need not serve a summons and complaint under Civil Rule 4.

**Rule 4. Answer; Motions; Time**

**(a) Serving the Answer.** An answer must be served on the plaintiff within 60 days after notice of the action is given under Rule 3.

**(b) The Answer.** An answer may be limited to a certified copy of the administrative record, and to any affirmative defenses under Civil Rule 8(c). Civil Rule 8(b) does not apply.

**(c) Motions Under Civil Rule 12.** A motion under Civil Rule 12 must be made within 60 days after notice of the action is given under Rule 3.

**(d) Time to Answer After a Motion Under Rule 4(c).** Unless the court sets a different time, serving a motion under Rule 4(c) alters the time to answer as provided by Civil Rule 12(a)(4).

**Rule 5. Presenting the Action for Decision**

The action is presented for decision by the parties' briefs. A brief must support assertions of fact by citations to particular parts of the record.

**Rule 6. Plaintiff's Brief**

The plaintiff must file and serve on the Commissioner a brief for the requested relief within 30 days after the answer is filed or 30 days after entry of an order disposing of the last remaining motion filed under Rule 4(c), whichever is later.

**Rule 7. Commissioner's Brief**

The Commissioner must file a brief and serve it on the plaintiff within 30 days after service of the plaintiff's brief.

**Rule 8. Reply Brief**

The plaintiff may file a reply brief and serve it on the Commissioner within 14 days after service of the Commissioner's brief.

**Committee Note**

Actions to review a final decision of the Commissioner of Social Security under 42 U.S.C. § 405(g) have been governed by the Civil Rules. These Supplemental Rules, however, establish a simplified procedure that recognizes the essentially appellate character of actions that seek only review of an individual's claims on a single administrative record, including a single claim based on the wage record of one person for an award to be shared by more than one person. These rules apply only to final decisions actually made by the Commissioner of Social Security. They do not apply to actions against another agency under a statute that adopts § 405(g) by considering the head of the other agency to be the Commissioner. There is not enough experience with such actions to determine whether they should be brought into the simplified procedures contemplated by these rules. But a court can employ these procedures on its own if they seem useful, apart from the Rule 3 provision for service on the Commissioner.

Some actions may plead a claim for review under § 405(g) but also join more than one plaintiff, or add a defendant or a claim for relief beyond review on the administrative record. Such actions fall outside these Supplemental Rules and are governed by the Civil Rules alone.

The Civil Rules continue to apply to actions for review under § 405(g) except to the extent that the Civil Rules are inconsistent with these Supplemental Rules. Supplemental Rules 2, 3, 4, and 5 are the core of the provisions that are inconsistent with, and supersede, the corresponding rules on pleading, service, and presenting the action for decision.

These Supplemental Rules establish a uniform procedure for pleading and serving the complaint; for answering and making motions under Rule 12; and for presenting the action for decision by briefs. These procedures reflect the ways in which a civil action under § 405(g) resembles an appeal or a petition for review of administrative action filed directly in a court of appeals.

Supplemental Rule 2 adopts the procedure of Civil Rule 3, which directs that a civil action be commenced by filing a complaint with the court. In an action that seeks only review on the administrative record, however, the complaint is similar to a notice of appeal. Simplified pleading is often desirable. Jurisdiction is pleaded under Rule 2(b)(1)(A) by identifying the action as one brought under § 405(g). The Social Security Administration can ensure that the plaintiff is able to identify the administrative proceeding and record in a way that enables prompt response by providing an identifying designation with the final decision. In current practice, this designation is called the Beneficiary Notice Control Number. The elements of the claim for review are adequately pleaded under Rule 2(b)(1)(B), (C), (D), and (E). Failure to plead all the matters described in Rule 2(b)(1)(B), (C), (D), and (E), moreover, should be cured by leave to amend, not dismissal. Rule 2(b)(2), however, permits a plaintiff to plead more than Rule 2(b)(1) requires.

Rule 3 provides a means for giving notice of the action that supersedes Civil Rule 4(i)(2). The Notice of Electronic Filing sent by the court suffices for service, so long as it provides a means of electronic access to the complaint. Notice to the Commissioner is sent to the appropriate office. The plaintiff need not serve a summons and complaint under Civil Rule 4.

Rule 4's provisions for the answer build from this part of § 405(g): "As part of the Commissioner's answer the Commissioner of Social Security shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are made." In addition to filing the record, the Commissioner must plead any affirmative defenses under Civil Rule 8(c). Civil Rule 8(b) does not apply, but the Commissioner is free to answer any allegations that the Commissioner may wish to address in the pleadings.

The time to answer or to file a motion under Civil Rule 12 is set at 60 days after notice of the action is given under Rule 3. If a timely motion is made under Civil Rule 12, the time to answer is governed by Civil Rule 12(a)(4) unless the court sets a different time.

Rule 5 states the procedure for presenting for decision on the merits a § 405(g) review action that is governed by the Supplemental Rules. Like an appeal, the briefs present the action for decision on the merits. This procedure displaces summary judgment or such devices as a joint statement of facts as the means of review on the administrative record. Rule 5 also displaces local rules or practices that are inconsistent with the simplified procedure established by these Supplemental Rules for treating the action as one for review on the administrative record.

All briefs are similar to appellate briefs, citing to the parts of the administrative record that support an assertion that the final decision is not supported by substantial evidence or is contrary to law.

Rules 6, 7, and 8 set the times for serving the briefs: 30 days after the answer is filed or 30 days after entry of an order disposing of the last remaining motion filed under

Rule 4(c) for the plaintiff's brief, 30 days after service of the plaintiff's brief for the Commissioner's brief, and 14 days after service of the Commissioner's brief for a reply brief. The court may revise these times when appropriate.

**Agenda E-19**
**Rules**
**March 2021**

## REPORT OF THE JUDICIAL CONFERENCE

## COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

**TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:**

* * * * *

## FEDERAL RULES OF CIVIL PROCEDURE

***Rule Recommended for Approval and Transmission***

The Advisory Committee on Civil Rules submitted a proposed amendment to Rule 7.1 (Disclosure Statement) for final approval. An amendment to subdivision (a) was published for public comment in August 2019. As a result of comments received during the public comment period, a technical conforming amendment was made to subdivision (b). The conforming amendment to subdivision (b) was not published for public comment.

The proposed amendment to Rule 7.1(a)(1) would require the filing of a disclosure statement by a nongovernmental corporation that seeks to intervene. This change would conform the rule to the recent amendments to Appellate Rule 26.1 (effective December 1, 2019) and Bankruptcy Rule 8012 (effective December 1, 2020).

The proposed amendment to Rule 7.1(a)(2) would create a new disclosure aimed at facilitating the early determination of whether diversity jurisdiction exists under 28 U.S.C. § 1332(a), or whether complete diversity is defeated by the citizenship of a nonparty individual or entity because that citizenship is attributed to a party. The proposal published for public comment identified the time that controls whether complete diversity exists as "the time the

action was filed." In light of public comments received, as well as discussion at the Committee's June 2020 meeting, the Advisory Committee made clarifying and stylistic changes to the proposal to further develop the rule's reference to the times that control for determining complete diversity. As approved by the Standing Committee at its January 2021 meeting, paragraph (a)(2) would require that a disclosure statement be filed "when the action is filed in or removed to federal court" and "when any later event occurs that could affect the court's jurisdiction under § 1332(a)."

The Standing Committee unanimously approved the Advisory Committee's recommendation that the proposed amendment to Rule 7.1 be approved and transmitted to the Judicial Conference.

> **Recommendation:** That the Judicial Conference approve the proposed amendment to Civil Rule 7.1 . . . and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

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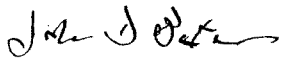
Respectfully submitted,



John D. Bates, Chair

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| Richard P. Donoghue | William K. Kelley |
| Jesse M. Furman | Carolyn B. Kuhl |
| Daniel C. Girard | Patricia A. Millett |
| Robert J. Giuffra Jr. | Gene E.K. Pratter |
| Frank M. Hull | Kosta Stojilkovic |
| William J. Kayatta Jr. | Jennifer G. Zipps |
| Peter D. Keisler | |

**Agenda E-19**
**Rules**
**September 2021**

## REPORT OF THE JUDICIAL CONFERENCE

## COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

**TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:**

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## FEDERAL RULES OF CIVIL PROCEDURE

### *Rules Recommended for Approval and Transmission*

The Advisory Committee on Civil Rules recommended for final approval proposed new Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g). The rules were published for public comment in August 2020.

The proposal to append to the Civil Rules a set of supplemental rules for Social Security disability review actions under 42 U.S.C. § 405(g) was prompted by a suggestion by the Administrative Conference of the United States that the Judicial Conference "develop for the Supreme Court's consideration a uniform set of procedural rules for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g)." Section 405(g) provides that an individual may obtain review of a final decision of the Commissioner of Social Security "by a civil action." A nationwide study commissioned by the Administrative Conference revealed widely differing district court procedures for these actions.

The proposed supplemental rules are the result of four years of extensive study by the Advisory Committee, which included gathering additional data and information from the various

stakeholders (claimant and government representatives, district judges, and magistrate judges) as well as feedback from the Standing Committee. As part of the process of developing possible rules, the Advisory Committee had to answer two overarching questions: first, whether rulemaking was the right approach (as opposed to model local rules or best practices); and, second, whether the benefits of having a set of supplemental rules specific to § 405(g) cases outweighed the departure from the usual presumption against promulgating rules applicable to only a particular type of case (i.e., the presumption of trans-substantivity). Ultimately, the Advisory Committee and the Standing Committee determined that the best way to address the lack of uniformity in § 405(g) cases is through rulemaking. While concerns about departing from the presumption of trans-substantivity are valid, those concerns are outweighed by the benefit of achieving national uniformity in these cases.

The proposed supplemental rules are narrow in scope, provide for simplified pleadings and service, make clear that cases are presented for decision on the briefs, and establish the practice of treating the actions as appeals to be decided on the briefs and the administrative record. Supplemental Rule 2 provides for commencing the action by filing a complaint, lists the elements that must be stated in the complaint, and permits the plaintiff to add a short and plain statement of the grounds for relief. Supplemental Rule 3 directs the court to notify the Commissioner of the action by transmitting a notice of electronic filing to the appropriate office of the Social Security Administration and to the U.S. Attorney for the district. Under Supplemental Rule 4, the answer may be limited to a certified copy of the administrative record and any affirmative defenses under Civil Rule 8(c).

Supplemental Rule 5 provides for decision on the parties' briefs, which must support assertions of fact by citations to particular parts of the record. Supplemental Rules 6 through

8 set the times for filing and serving the briefs at 30 days for the plaintiff's brief, 30 days for the Commissioner's brief, and 14 days for the plaintiff's reply brief.

The public comment period elicited a modest number of comments and two witnesses at a single public hearing. There is almost universal agreement that the proposed supplemental rules establish an effective and uniform procedure, and there is widespread support from district judges and the Federal Magistrate Judges Association. However, the DOJ opposed the supplemental rules primarily on trans-substantivity grounds, favoring instead the adoption of a model local rule.

The Advisory Committee made two changes to the rules in response to comments. First, as published, the rules required that the complaint include the last four digits of the social security number of the person for whom, and the person on whose wage record, benefits are claimed. Because the Social Security Administration is in the process of implementing the practice of assigning a unique alphanumeric identification, the rule was changed to require the plaintiff to "includ[e] any identifying designation provided by the Commissioner with the final decision." (The committee note was subsequently augmented to observe that "[i]n current practice, this designation is called the Beneficiary Notice Control Number.") Second, language was added to Supplemental Rule 6 to make it clear that the 30 days for the plaintiff's brief run from entry of an order disposing of the last remaining motion filed under Civil Rule 12 if that is later than 30 days from the filing of the answer. At its meeting, the Standing Committee made minor changes to Supplemental Rule 2(b)(1) – the paragraph setting out the contents of the complaint – in an effort to make that paragraph easier to read; it also made minor changes to the committee note.

With the exception of the DOJ, which abstained from voting, the Standing Committee unanimously approved the Advisory Committee's recommendation that the new Supplemental

Rules for Social Security Review Actions Under 42 U.S.C. § 405(g) be approved and transmitted to the Judicial Conference.

> **Recommendation:** That the Judicial Conference approve the proposed new Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g) . . . and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

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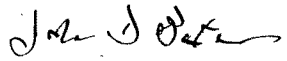
Respectfully submitted,



John D. Bates, Chair

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| Jesse M. Furman | Carolyn B. Kuhl |
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| William K. Kelley | |

**Excerpt from the December 9, 2020 Report of the Advisory Committee on Civil Rules (revised January 5, 2021)**

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544



**MEMORANDUM**

**TO:** Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

**FROM:** Hon. Robert M. Dow, Jr., Chair
Advisory Committee on Civil Rules

**RE:** Report of the Advisory Committee on Civil Rules

**DATE:** December 9, 2020 (revised January 5, 2021)

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*Introduction*

The Advisory Committee on Civil Rules met on a teleconference platform that included public access on October 16, 2020. Draft minutes from the meeting are attached to this report.

Part I of this report presents three items for action. The first recommends approval for adoption of amendments to Rule 7.1 that were published for comment in August 2019.

* * * * *

**Excerpt from the December 9, 2020 Report of the Advisory Committee on Civil Rules (revised January 5, 2021)**

## I. Action Items

### A. For Final Approval: Amendment to Rule 7.1

Two distinct proposals to amend Rule 7.1(a) were published in August 2019. Further consideration of the proposal in light of the public comments demonstrated the wisdom of making a conforming amendment of Rule 7.1(b). The amendments were brought to the Standing Committee with a recommendation for adoption in June 2020. The topic was remanded for further consideration of the part of Rule 7.1(a)(2) that addresses the time of the citizenships that establish or defeat complete diversity. A revised version of that provision was developed after lengthy deliberation. The revised version is recommended for adoption, and is transmitted along with an alternative that takes the simpler approach of omitting any reference to the times of the citizenships.

The proposed amendment to Rule 7.1(a)(1) and the conforming amendment to Rule 7.1(b) are discussed first. They have not presented any difficulty, but the report that recommended them for adoption at the June meeting is presented again for convenience. The more complicated questions raised by Rule 7.1(a)(2) are discussed after that.

The proposed full rule text recommended for adoption, marked to show changes since publication by double underlining, is:

**Rule 7.1 Disclosure Statement**

(a) WHO MUST FILE; CONTENTS.

(1) *Nongovernmental Corporations.* A nongovernmental corporate party or any nongovernmental corporation that seeks to intervene must file ~~2 copies of~~ a ~~disclosure~~ statement that:

(~~1~~A) identifies any parent corporation and any publicly held corporation owning 10% or more of its stock; or

(~~2~~B) states that there is no such corporation.

(2) *Parties or Intervenors in a Diversity Case.* ~~Unless the court orders otherwise, a party~~ In an action in which jurisdiction is based on diversity under 28 U.S.C. § 1332(a), a party or intervenor must, unless the court orders otherwise, file a disclosure statement that names—and identifies the citizenship of—every individual or entity whose citizenship

is attributed to that party or intervenor ~~at the time~~ when:

(A) the action is filed in or removed to federal court, and

(B) any subsequent event occurs that could affect the court's jurisdiction.

(b) TIME TO FILE; SUPPLEMENTAL FILING. A party or intervenor must:

(1) file the disclosure statement * * *.

*Rule 7.1(a)(1)*

The proposal to amend Rule 7.1(a)(1) published in August 2019 reads:

**Rule 7.1. Disclosure Statement**

(a) WHO MUST FILE; CONTENTS.

(1) *Nongovernmental Corporations.* A nongovernmental corporate party or any nongovernmental corporation that seeks to intervene must file ~~2 copies of~~ a ~~disclosure~~ statement that:

~~(1)~~ (A) identifies any parent corporation and any publicly held corporation owning 10% or more of its stock; or

~~(2)~~ (B) states that there is no such corporation.

This amendment conforms Rule 7.1 to recent similar amendments to Appellate Rule 26.1 and Bankruptcy Rule 8012(a). It drew three public comments. Two approved the proposal. The third suggested that the categories of parties that must file disclosure statements should be expanded for both parties and intervenors, a subject that has been considered periodically by the advisory committees without yet leading to any proposals for amending the parallel rules.

The Advisory Committee recommends approval for adoption of the Rule 7.1(a)(1) amendment.

*Rule 7.1(b)*

Discussion of public comments on the time to make diversity party disclosures under proposed Rule 7.1(a)(2) led the Advisory Committee to recognize that the time provisions in Rule 7.1(b) should be amended to conform to the new provision for intervenor

disclosures in Rule 7.1(a)(1):

(b) TIME TO FILE; SUPPLEMENTAL FILING. A party or intervenor must:
(1) file the disclosure statement * * *.

This is a technical amendment to conform to adoption of amended rule 7.1(a)(1) and can be approved for adoption without publication.

*Rule 7.1(a)(2)*

Rule 7.1(a)(2) is a new disclosure provision designed to establish a secure basis for determining whether there is complete diversity to establish jurisdiction under 28 U.S.C. § 1332(a). The Advisory Committee recommends that it be approved for adoption with changes suggested by the public comments, as revised to address the concerns raised in the Standing Committee discussion last June.

The core of the diversity jurisdiction disclosure lies in the requirement that every party or intervenor, including the plaintiff, name and disclose the citizenship of every individual or entity whose citizenship is attributed to that party or intervenor. The proposed rule text has been modified to identify more accurately the time that is relevant to determining the citizenships that control diversity jurisdiction.

The citizenship of a natural person for diversity purposes is readily established in most cases, although somewhat quirky concepts of domicile may at times obscure the question. Section 1332(c)(1) codifies familiar rules for determining the citizenship of a corporation without looking to the citizenships of its owners.

Noncorporate entities, on the other hand, commonly take on the citizenships of all their owners. The rules are well settled for many entities. The rule also seems to be well settled for limited liability companies. The citizenship of every owner is attributed to the LLC. If an owner is itself an LLC, that LLC takes on the citizenships of all of its owners. The chain of attribution reaches higher still through every owner whose citizenship is attributed to an entity closer along the chain of owners that connects to the party LLC. The great shift of many business enterprises to the LLC form means that the diversity question arises in an increasing number of actions filed in, or removed to, federal court.

The challenges presented by the need to trace attributed ownership are a function of factors beyond the mere proliferation of LLCs. Many LLCs are not eager to identify their owners—the negative comments on the published rule included those that insisted that disclosure is an unwarranted invasion of the owners' privacy. Beyond that, the more elaborate LLC ownership structures may make it difficult, and at times impossible, for an LLC to identify all of the individuals and entities whose citizenships are attributed to it, let alone determine what those citizenships are. But if it is difficult for an LLC party to identify all of its attributed citizenships, it is more difficult for the other parties and the court, whose only likely source of information is the LLC party itself.

As difficult as it may be to determine attributed citizenships in some cases, the imperative of ensuring complete diversity requires a determination of all of the citizenships attributed to every party. Some courts require disclosure now, by local rule, standard terms in a scheduling order, or more ad hoc means. And there are cases in which inadvertence, indifference, or perhaps strategic calculation have led to a belated realization that there is no diversity jurisdiction, wasting extensive pretrial proceedings or even a completed trial.

Disclosure by every party when an action first arrives in federal court, or at a later time that may displace the relevance of the time of filing the complaint or notice of removal, is a natural way to safeguard complete diversity. Most of the public comments approve the proposal, often suggesting that it will impose only negligible burdens in most cases. Summaries of the comments were attached to the June report.

The public comments indirectly illuminated the value of developing further the published rule text that identified the time that controls the existence of complete diversity as "the time the action is filed." Many of the comments supporting the proposal suggested that defendants frequently remove actions from state court without giving adequate thought to the actual existence of complete diversity. Some of these comments feared that the published rule text did not speak clearly to the need to distinguish between citizenship at the time a complaint is filed in federal court and citizenship at the time a complaint is filed in state court, to be followed by removal. Removal, for example, may become possible only after a diversity-destroying party is dropped from the action in state court.

Committee discussion of this question last April emphasized the rules that require complete diversity at some time other than

the original filing in federal court or removal to it. One example is changes in the parties after an action is filed. Other and more complex examples may arise in determining removal jurisdiction. Disclosure should aim at the direct and attributed citizenships of each party at the time identified by the complete-diversity rules. The time at which the court makes the determination is not relevant, although the purpose of requiring disclosure is to facilitate determination as early as possible.

These observations led to revising the rule text to the form presented to the Standing Committee last June, calling for disclosures of citizenships:

> (A) at the time the action is filed in or removed to federal court; or
> (B) at another time that may be relevant to determining the court's jurisdiction.

Discussion in the Standing Committee focused on two perceived problems with this formulation.

The first problem arose from concern that the rule would be misread, taking it to address the time for filing the disclosure statement rather than the time of the citizenships that must be considered in determining diversity jurisdiction. That concern could be met by adding redundant but perhaps helpful words to the rule text: " * * * a party or intervenor must, unless the court orders otherwise, file at the time set by Rule 7.1(b) a disclosure statement * * *." But it is better met by substituting a new formula for "at the time" and "at another time" in the rule text. That change is shown in the revised rule text.

The second problem arose from concern that many parties would be confused by the reference to "another time that may be relevant to determining the court's jurisdiction." Diversity will be determined in most cases by the citizenships that exist at the time the action is initially filed in federal court, or at the time it is removed. But many lawyers know that the rules that govern diversity jurisdiction can be complicated, and fear that they must undertake time-consuming and costly research to be sure that their cases do not come within one of the variations on the basic rule. Some might be simply bewildered. The proposal was remanded for further consideration of this concern.

The Advisory Committee's deliberations on remand are summarized in the draft October Minutes. The Advisory Committee renewed its belief that it is useful to adopt rule text that directs attention to the problem that diversity jurisdiction is not

permanently fixed by the citizenships that exist at the time a case first comes to the federal court, whether by initial filing or removal. And it concluded that clear language can reduce, indeed virtually eliminate, the risk that lawyers will be driven to undertake unnecessary research into diversity jurisdiction doctrine. The recommended new language focuses on events subsequent to filing or removal, providing assurance by focusing directly on changes in the shape of the litigation. Substituting "when" for "at the time" also should address the concern about confusion between the time for making disclosure and the times of the citizenships to be disclosed:

> * * * must file a disclosure statement * * * when:
>
> (A) the action is filed in or removed to federal court, and
> (B) any subsequent event occurs that could affect the court's jurisdiction.

Although the Advisory Committee recommends this revised version for adoption, it offers an alternative recommendation for adoption in the event that the revised version does not assuage the concerns that led the Standing Committee to remand. The alternative would simply omit everything in subparagraphs (A) and (B) as shown above. The rule text would say nothing about the times of the citizenships that determine whether there is diversity jurisdiction. This version does what is required to establish a disclosure practice that will provide a secure foundation for prompt and accurate determinations of jurisdiction. That is the most important task set for the rule.

This alternative version also responds to the problem presented by any attempt to use rule text to remind the parties of the complexities that occasionally arise from the more esoteric corners of diversity jurisdiction requirements. No court rule can change those requirements. Any attempt to provide a comprehensive digest would inevitably be incomplete, and might well be inaccurate on one or another points. Referring to "another time that may be relevant" showed the risks of a simple reference. Referring to "any subsequent event" may not fully allay this concern. Rule 7.1(b) provides an indirect reminder of the need to supplement an earlier disclosure "if any required information changes." That includes a change in the information that is required as well as a change in the information itself. The committee note can point to the general issue, providing a rough guide of the need to remain alert for developments in the litigation that may call for additional disclosures.

Two additional paragraphs from the June report may be provided to fill out the reminder of other issues that have not been challenged in earlier discussions.

A problem remains when a party's disclosure statement, perhaps illuminated by responses to follow-up discovery, shows that the party cannot identify all of the citizenships that may be attributed to it. The committee note observes that the disclosure rule does not address this problem. Renewed committee discussion rejected a suggestion that the Note should be revised to suggest that a party could ask the court to order that no more than reasonable inquiry is required. The rule cannot reduce the informational burdens required by the doctrines of subject-matter jurisdiction. Nor does it seem wise to attempt to answer the questions that will arise when the party asserting jurisdiction is unable to pry complete information from another party who has far better access to information about its owners, members, or others whose citizenships are attributed to it.

Some public comments opposed adoption of the diversity disclosure proposal. Two of them came from bar groups that have provided helpful advice on many occasions in the past, the American College of Trial Lawyers and the City Bar of New York. Each suggested that a better answer to the dilemma of determining the citizenship of LLCs would be for Congress or the Supreme Court to treat them as corporations. In addition, they suggested that some LLCs may experience great difficulty in determining all attributed citizenships, making it better to rely on targeted discovery in the few cases that present genuine puzzles about citizenship. They also observed that the LLC form is often adopted to protect the privacy of the owners, a point supplemented by other comments suggesting that privacy is particularly important for "non-citizen" owners. An added concern was that expansive diversity disclosures may include so much information that they distract attention from the information that is important in considering judicial recusal, the original purpose of Rule 7.1.

The proposed disclosure rule is recommended for adoption in one of the two forms advanced for discussion. The version that alerts the parties to the need to consider subsequent events that may change the calculus of diversity is the first recommendation. But if it still seems too risky, little is likely to be gained by considering still further variations on subparagraphs (A) and (B). The alternative recommendation is to forgo any attempt to allude to "subsequent events" in rule text by simply omitting subparagraphs (A) and (B) revised. It is not a perfect answer to the puzzles created by the requirement of complete diversity. But it will go a long way toward eliminating inadvertent exercise of federal

jurisdiction in cases that should be decided by state courts, and—at least as important—toward protecting against tardy revelations of diversity-destroying citizenships that lay waste to substantial investments in federal litigation.

*Clean Rule Text*[1]

**Rule 7.1 Disclosure Statement**

(a) WHO MUST FILE; CONTENTS.

(1) *Nongovernmental Corporations.* A nongovernmental corporate party or a nongovernmental corporation that seeks to intervene must file a statement that:

(A) identifies any parent corporation and any publicly held corporation owning 10% or more of its stock; or

(B) states that there is no such corporation.

(2) *Parties or Intervenors in a Diversity Case.* In an action in which jurisdiction is based on diversity under 28 U.S.C. § 1332(a), a party or intervenor must, unless the court orders otherwise, file a disclosure statement. The statement must name—and identify the citizenship of—every individual or entity whose citizenship is attributed to that party or intervenor:

(A) when the action is filed in or removed to federal court, and

(B) when any later event occurs that could affect the court's jurisdiction under § 1332(a).

(b) TIME TO FILE; SUPPLEMENTAL FILING. A party, intervenor, or proposed intervenor must:

(1) file the disclosure statement * * *.

COMMITTEE NOTE

Rule 7.1(a)(1). Rule 7.1 is amended to require a disclosure statement by a nongovernmental corporation that seeks to intervene. This amendment conforms Rule 7.1 to similar recent amendments to Appellate Rule 26.1 and Bankruptcy Rule 8012(a).

Rule 7.1(a)(2). Rule 7.1 is further amended to require a party or intervenor in an action in which jurisdiction is based on

[1] Revised to reflect stylistic changes made during the January 5, 2021 meeting of the Committee on Rules of Practice and Procedure.

diversity under 28 U.S.C. § 1332(a) to name and disclose the citizenship of every individual or entity whose citizenship is attributed to that party or intervenor. The disclosure does not relieve a party that asserts diversity jurisdiction from the Rule 8(a)(1) obligation to plead the grounds for jurisdiction, but is designed to facilitate an early and accurate determination of jurisdiction.

Two examples of attributed citizenship are provided by § 1332(c)(1) and (2), addressing direct actions against liability insurers and actions that include as parties a legal representative of the estate of a decedent, an infant, or an incompetent. Identifying citizenship in such actions is not likely to be difficult, and ordinarily should be pleaded in the complaint. But many examples of attributed citizenship arise from noncorporate entities that sue or are sued as an entity. A familiar example is a limited liability company, which takes on the citizenship of each of its owners. A party suing an LLC may not have all the information it needs to plead the LLC's citizenship. The same difficulty may arise with respect to other forms of noncorporate entities, some of them familiar—such as partnerships and limited partnerships—and some of them more exotic, such as "joint ventures." Pleading on information and belief is acceptable at the pleading stage, but disclosure is necessary both to ensure that diversity jurisdiction exists and to protect against the waste that may occur upon belated discovery of a diversity-destroying citizenship. Disclosure is required by a plaintiff as well as all other parties and intervenors.

What counts as an "entity" for purposes of Rule 7.1 is shaped by the need to determine whether the court has diversity jurisdiction under § 1332(a). It does not matter whether a collection of individuals is recognized as an entity for any other purpose, such as the capacity to sue or be sued in a common name, or is treated as no more than a collection of individuals for all other purposes. Every citizenship that is attributable to a party or intervenor must be disclosed.

Discovery should not often be necessary after disclosures are made. But discovery may be appropriate to test jurisdictional facts by inquiring into such matters as the completeness of a disclosure's list of persons or the accuracy of their described citizenships. This rule does not address the questions that may arise when a disclosure statement or discovery responses indicate that the party or intervenor cannot ascertain the citizenship of every individual or entity whose citizenship may be attributed to it.

The rule recognizes that the court may limit the disclosure in appropriate circumstances. Disclosure might be cut short when a party reveals a citizenship that defeats diversity jurisdiction. Or the names of identified persons might be protected against disclosure to other parties when there are substantial interests in privacy and when there is no apparent need to support discovery by other parties to go behind the disclosure.

Disclosure is limited to individuals and entities whose citizenship is attributed to a party or intervenor. The rules that govern attribution, and the time that controls the determination of complete diversity, are matters of subject-matter jurisdiction that this rule does not address. A supplemental statement is required if an event occurs after initial filing in federal court or removal to it that requires a determination of citizenships as they exist at a time after the initial filing or removal.

Rule 7.1(b). Rule 7.1(b) is amended to reflect the provisions in Rule 7.1(a) that extend the disclosure obligation to proposed intervenors and intervenors.

* * * * *

**Excerpt from the May 21, 2021 Report of the Advisory Committee on Civil Rules**

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544



**MEMORANDUM**

**TO:** Hon. John D. Bates, Chair
Committee on Rules of Practice and Procedure

**FROM:** Hon. Robert M. Dow, Jr., Chair
Advisory Committee on Civil Rules

**RE:** Report of the Advisory Committee on Civil Rules

**DATE:** May 21, 2021

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*Introduction*

The Civil Rules Advisory Committee met on a teleconference platform that included public access on April 23, 2021. Draft minutes of the meeting are attached.

Part I of this report presents three items for action. The first recommends approval for adoption of Supplemental Rules for Social Security Review Actions under 42 U.S.C. § 405(g).

* * * * *

**Social Security Rules (for Final Approval)**

The Rules. The Advisory Committee recommends adoption of the proposed Supplemental Rules for Social Security Review Actions Under 42 U.S.C. § 405(g) that were published for comment in August 2020.

**Excerpt from the May 21, 2021 Report of the Advisory Committee on Civil Rules**

* * * * *

As compared to many published proposals to amend one of the general Civil Rules, there were only a modest number of comments, and only two witnesses at a single hearing. Most of the comments and testimony reiterated themes made familiar during the conferences held by the Social Security Review Subcommittee and in its many exchanges with interested organizations and practitioners through the formal conferences and less formal exchanges. Those who participated included the Administrative Conference of the United States, which initially proposed that special social security rules be adopted; the Social Security Administration (SSA); the National Organization of Social Security Claimants' Representatives; the American Association for Justice; federal district judges and magistrate judges; individual claimants' attorneys; and academics, including one of the coauthors of the exhaustive survey of current practices that stimulated the Administrative Conference to propose new rules. Two changes were made in the published rules texts, as noted below. Summaries of the comments and testimony are attached.

Much of what emerged from the comments and testimony was anticipated in discussion at the Standing Committee meeting on June 23, 2020, that approved publication. There is widespread, essentially universal agreement that the rules themselves establish an effective and nationally uniform procedure for these cases. They are appeals on an administrative record, little suited for disposition under civil rules designed for cases that are shaped for trial through motions to dismiss, scheduling orders, discovery, motions for summary judgment, and occasionally for actual trial on the merits. The extensive and painstaking work that developed these rules has produced a procedure as good as can be developed.

This approval of the rules themselves led to widespread support for their adoption. District judges and the Federal Magistrate Judges Association support adoption, including the chief judges of two districts that are among the three districts that entertain the greatest number of social security review actions. These two districts already follow local procedures similar to the proposed national rules, as do several others that have become dissatisfied with attempts to provide an efficient review procedure under the general civil rules. Support is provided by other organizations, including vigorous support grounded on the belief that these rules will be a great help to pro se claimants.

Despite agreement on the quality of the proposed rules, some opposition remains. Claimants' representatives are comfortable with the widely diverse range of practices they confront now. Even those who practice across two or more districts say they can comfortably conform to local differences. They think there is no pressing need to establish a uniform national practice. And they fear that judges who now provide efficient review under accustomed local procedures will not be as efficient if forced to conform to a different national procedure. Some also predict that the effort to achieve uniformity will be thwarted by the insistence of some judges on adhering to their own preferred practices.

A distinctive ground of opposition has been offered by the Department of Justice. Although the Department has promoted adoption of a model local rule drawn along lines proposed by earlier drafts of the supplemental rules, it fears that adopting a set of supplemental rules for these cases will encourage efforts to promote distinctive rules for other substantive areas and for purposes less

aligned with the public interest. That concern ties to the broader questions about adopting transsubstantive rules that are discussed below.

Given the general agreement that the proposed rules are well suited to the task, they can be summarized briefly.

Supplemental Rule 1(a) defines the scope of the rules. They apply to § 405(g) actions brought against the Commissioner of Social Security for review on the administrative record of an individual claim. More complicated actions are governed only by the general Civil Rules. Supplemental Rule 1(b) confirms that the general Civil Rules also apply, "except to the extent that they are inconsistent with these rules."

Supplemental Rule 2(a) provides for commencing the action by filing a complaint. Supplemental Rule 2(b)(1) provides the elements that must be stated in the complaint: identifying the action as a § 405(g) action and the final decision to be reviewed, the person for whom benefits are claimed, the person on whose wage record benefits are claimed, and the type of benefits claimed. Subdivisions (b)(1)(B) and (C) are one of the parts of the rules modified in response to public comment and testimony. As published, they required that the complaint include the last four digits of the social security number of the person for whom, and the person on whose wage record, benefits are claimed. This feature drew steady fire during the period leading up to publication and after publication, but was retained because the SSA maintained that it resolves so many claims that often it could not identify the administrative proceeding and record by name alone. The comments and testimony revealed that the SSA is in the process of implementing a practice of assigning a unique 13-character alphanumeric identification, now called the Beneficiary Notice Control Number, for each notice it sends. This process is expected to be adopted for all proceedings by the time the Supplemental Rules could become effective. The amended rule text requires the plaintiff to "includ[e] any identifying designation provided by the Commissioner with the final decision." The final part of Supplemental Rule 2, subdivision (b)(2), permits – but does not require – the plaintiff to add a short and plain statement of the grounds for relief. One of the reasons this provision is supported by claimants' representatives is that it can be used to inform the SSA of reasons that may lead it to request a voluntary remand.

Supplemental Rule 3 dispenses with service of summons and complaint under Civil Rule 4. Instead, the court is directed to notify the Commissioner of the action by transmitting a notice of electronic filing to the appropriate SSA office and to the United States Attorney for the district. This rule is modeled on practices established in a few districts. It has been welcomed on all sides.

Supplemental Rule 4(a) and (b) set the time to answer and provide that the answer may be limited to a certified copy of the administrative record and any affirmative defenses under Civil Rule 8(c). "Civil Rule 8(b) does not apply," leaving the Commissioner free to decide whether to respond to the allegations in the complaint. Claimants' representatives would prefer that Rule 8(b) apply, but framing the dispute through the briefs is more in keeping with the appellate nature of these actions. Supplemental Rule 4(c) and (d) address motions, incorporating Civil Rule 12 as a convenient cross-reference for the parties.

Supplemental Rule 5 is the heart of the new procedure. "The action is presented for decision by the parties' briefs," which must support assertions of fact by citations to particular parts of the record. Briefs establish a suitable procedure for appellate review on a closed administrative record.

Supplemental Rules 6 through 8 set the times for filing and serving the briefs at 30 days for the plaintiff's brief, 30 days for the Commissioner's brief, and 14 days for a reply brief by the plaintiff. Supplemental Rule 6 includes the other change made in response to a comment, incorporating language making it clear that the 30 days for the plaintiff's brief run from entry of an order disposing of the last remaining motion filed under Rule 4(c) if that is later than 30 days from filing the answer. From the beginning, these periods have been challenged as too short. Administrative records are long, and plaintiffs' attorneys often practice in small firms without the resources to manage occasional excessive workloads. The SSA attorneys also may be overburdened. Experience in courts that set similarly tight times for briefs shows that extensions are regularly requested and routinely granted. Why not, it is urged, set the periods at 60 days, 60 days, and 21 days? The Advisory Committee has resisted these arguments, believing that shorter times can be met in many cases, and that setting them in the rule will encourage prompt briefing, and perhaps prompt decision. Claimants commonly have had to engage with the administrative process for at least a few years, and often are in urgent need of benefits. The Civil Rule 6(b)(1) authority to extend time remains available.

Transsubstantivity Widespread agreement that the Supplemental Rules establish a strong, sensible, and nationally uniform procedure for resolving appeals on the administrative record moves the question to concerns about adopting rules for a specific substantive subject. These concerns have accompanied the project from the beginning. They were discussed during the June 23, 2020, Standing Committee meeting that approved publication. The discussion is summarized at pages 20-22 of the meeting minutes, pages 48-50 of the agenda materials for the January 5, 2021 meeting. The discussion was valuable, but the vote to approve publication was not intended to conclude the matter. "Transsubstantivity" remains to be considered as the only ground for reluctance to recommend the rules for adoption.

The discussion last June, and at earlier meetings, has made the issues familiar. The theoretical issues may be summarized first, followed by an evaluation of the more pragmatic and more difficult issues.

The theoretical issue is regularly framed around the word in the Rules Enabling Act, 28 U.S.C. § 2072(a), that authorizes the Supreme Court to prescribe "general" rules of practice and procedure. It is common ground that the Civil Rules must be general in the sense that they apply to all district courts. At the same time, multiple familiar examples demonstrate the adoption of rules that address specific subject matter. Rule 71.1(a) directs that "These rules govern proceedings to condemn real and personal property by eminent domain, except as this rule provides otherwise." Rule A(2) of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions directs that "The Federal Rules of Civil Procedure also apply * * * except to the extent that they are inconsistent with these Supplemental Rules." Rule G of those rules, adopted at the urgent request of the Department of Justice, focuses only on "a forfeiture action in rem arising under a federal statute." Special rules have been adopted for § 2254 proceedings, and for § 2255 proceedings as well; each of those sets of rules concludes with a similar Rule 12, applying the

Civil Rules – and for the § 2255 rules the Criminal Rules as well – "to the extent that they are not inconsistent with any statutory provisions or these rules." Civil Rule 65(f) provides a much more focused example: "This rule applies to copyright impoundment proceedings." The 2001 committee note explains that this rule was adopted in tandem with "abrogation of the antiquated Copyright Rules of Practice for proceedings under the 1909 Copyright Act." An even more modest illustration is provided by Appellate Rule 15.1, which supplements the general Appellate Rule 15 procedures for petitions to review agency orders by setting the order of briefing and argument in an enforcement or review proceeding that involves the National Labor Relations Board. The 1986 committee note explains that the rule "simply confirms the existing practice in most circuits."

These examples provide powerful support for the proposition that rules aimed at a specific subject matter come within the authority to prescribe "general" rules of practice and procedure.

Powerful support also exists in the pragmatic grounds for adopting the Supplemental Rules for Review of Social Security Decisions under 42 U.S.C. § 405(g). They began, not with a suggestion advanced to promote private interests, however worthy, but with a suggestion advanced by the United States Administrative Conference and based on a comprehensive survey performed by two prominent law professors that showed wide and often deep differences in practice in different districts. This suggestion, advanced to promote a view of the public interest formed by a body deeply immersed in the relationships between administrative agencies and the courts, has been enthusiastically embraced by the Social Security Administration, support that has been strongly maintained even as the drafting process continually whittled away more detailed versions proposed by the Administration.

The opportunity to improve the procedures for review in these actions is particularly attractive because they are brought in great numbers. For several years, the annual average has run from 17,000 to 18,000 review actions, and more recently has surpassed 19,000 actions. Much can be gained by a nationally uniform and good procedure adapted to the needs of appeals to the district courts that raise only questions of law and review for substantial evidence to support the Commissioner's final decision. As noted earlier, the district judges and magistrate judges who explored and commented on these rules became strong supporters.

The initial drafting stages considered the possibility of moving away from this specific subject matter to draft a more general rule for actions brought in a district court for review of other kinds of administrative action. The possibility was put aside. A major problem is presented by the wide variety of actions that challenge administrative action. Some prove, either in theory or in application, to be equally pure examples of review on a closed administrative record. Others, however, provide reasons to resort to ordinary civil procedure, including discovery and perhaps summary judgment. And it likely would prove difficult to establish an appropriate scope for any such rule, drawing lines to exclude actions aimed at executive actions that follow procedures perhaps more, and perhaps less, like administrative procedure. Even if a workable scope provision could be adopted, developing a suitable procedure for all these actions would be truly difficult. Nor is there any reason to suppose that the total number of actions that might be reached would approach the number of social security review actions.

Several concerns have been advanced to counter these favorable considerations, drawing not from these specific rules but from more general issues that surround subject-specific rules. They deserve consideration, even if they do not prove persuasive.

One concern is that subject-specific rules may favor plaintiffs or defendants on a regular basis. The social security rules were developed in close consultation with claimants' representatives as well as with the SSA. Many proposals by the SSA were rejected, and many suggestions by claimants were adopted. Comments and testimony after publication recognize these elements of neutrality. The rules, as a whole, are designed to advance alike the interests of claimants, the SSA, and the courts. They offer no sound ground even for a perception that they favor the SSA, despite some lingering protests on that score, including a perception that the rules are designed to reduce burdens on the SSA staff attorneys as they work to comply with different local procedures.

Another concern is that subject-specific rules can be developed only on the basis of deep familiarity with the realities of litigating the subject. That is a serious concern. The years of work undertaken by the subcommittee in collaboration with experts on all sides of social security review appeals, however, have supported development of rules that all agree are well shaped for these actions.

Perhaps the most serious concern might be described as the weakened levee concern. The fear is that adding one more substance-specific set of rules to those that have already been adopted will undercut resistance to self-interested pleas and pressure to develop still more substance-specific rules. Little optimism is needed to predict that the several entities engaged in the Rules Enabling Act process will resist such pressures, supporting subject-specific rules only when strongly justified. There may be better reason to fear that advocates in Congress will argue that their favorite procedures can be adopted because the Supreme Court has prescribed other subject-specific rules and Congress has accepted them. That fear must be considered, but it should not deter adoption of good rules that will improve litigation practices, and at times improve outcomes, to the benefit of claimants, the SSA, and the courts themselves.

The draft minutes of the April 23, 2021, Civil Rules Committee meeting describe the deliberations that led the Advisory Committee to recommend adoption, with one member abstaining because absent from the meeting up to the moment of the vote, and over the dissent of the Department of Justice based on the fear of reducing the ability to resist pressures to adopt other and less well executed and designed substance-specific rules. The Advisory Committee has debated the Department's concern repeatedly during the years-long development of these rules. The concern has been recognized as valid, but the conclusion is that these Supplemental Rules serve party-neutral and important purposes so well that they should be adopted.

* * * * *